finding that [petitioner's] cross burning constituted a willful threat of force" and that "the cross burning was the only object of the alleged § 241 conspiracy." *Id.* at 14a. In those circumstances, "it would be passing strange if the jury did not believe that [petitioner] and L.M. had conspired to threaten *force*." *Ibid.* The court added that, although petitioner's argument that the instruction was flawed relied on Eighth Circuit precedent in cross-burning cases, there was an "absence at the time of the appeal of any authority from the Supreme Court or this circuit adopting the law set forth in the Eighth Circuit cross-burning decisions." *Ibid.* The court concluded that, under all the circumstances, it "cannot say that it was objectively unreasonable for [petitioner's] appellate counsel not to raise the First Amendment challenges to his convictions under §§ 241 and 3631." *Ibid.*

c. The court also held that petitioner's appellate counsel had not been ineffective in failing to raise either of the Section 844(h)(1) claims petitioner advanced in his Section 2255 motion.[3] The court concluded that appellate counsel had not acted unreasonably in failing to claim that his Section 844(h)(1) conviction violated the First Amendment because it imposed special punishment on him because of the content of his speech. The court explained that increased punishment for "especially pernicious" threats, Pet. App. 16a, does not conflict with this Court's decision in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), which prohibited basing punishment for even unprotected speech on the point of view being expressed. The court noted that threats

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[3] On appeal, petitioner abandoned his claim that Section 844(h)(1) applies only to arson.

that make use of fire and are therefore subject to punishment under Section 844(h)(1) "exhibit to a higher degree than other felonious threats the characteristics that makes threats proscribable," because such threats have "the potential not only to frighten in a distinctly profound way but also * * * to cause the threatened harm to person or property." Pet. App. 16a. Accordingly, the court concluded that the merits of the claim that counsel failed to raise were "highly questionable." *Ibid.* See also *id.* at 17a ("doubtful").

The court also concluded that counsel had not acted unreasonably in failing to attack his Section 844(h)(1) conviction on the ground that that provision cannot be based on a Section 241 conspiracy. The court recognized that, in a decision that postdated petitioner's appeal by two years, the Seventh Circuit had agreed with petitioner's argument, reasoning that unless fire is used in the process of reaching agreement, a conspiracy that does not require proof of an overt act cannot be the predicate felony under Section 844(h)(1). Pet. App. 17a (citing *United States* v. *Colvin*, 353 F.3d 569 (7th Cir. 2003) (en banc), cert. denied, 543 U.S. 925 (2004)). The court stated however, it was "not sure" it "would embrace *Colvin*." *Ibid.* The court discussed a number of ways in which conspiracy is a "*continuing* offense, encompassing the acts performed in furtherance of the agreement."[4] The court determined that an ultimate

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[4] See Pet. App. 17a ("venue is proper wherever acts in furtherance of the conspiracy occur"); *id.* at 17a-18a (noting that for the exception to hearsay for statements of a co-conspirator "the statement need not further the *attainment* of an agreement; it is enough that it further an *object* of the agreement"); *id.* at 18a ("for statute-of-limitations purposes, a non-overt-act conspiracy is not committed simply on the date the agreement is made but 'is deemed to continue as long as its

decision on the merits of the question whether Section 844(h)(1) applies to a conspiracy under Section 241 was unnecessary, however, because at the time of direct appeal "[n]o decisions had yet adopted [petitioner's] view," and therefore his counsel's failure to raise the issue was not unreasonable under *Strickland*. *Id.* at 18a.

ARGUMENT

Petitioner argues that further review is warranted to address the court of appeals' application of the *Strickland* standard to his claim of ineffective assistance of appellate counsel and to address his substantive claims that the jury instructions in this case did not adequately protect his First Amendment rights and that a Section 844(h)(1) conviction cannot be based on a Section 241 conspiracy. The court of appeals' application of the *Strickland* standard to the particular facts of this case does not conflict with any decision of any other circuit and does not warrant further review. The merits of the substantive issues petitioner discusses are not squarely before the Court in this case, which arises on collateral review and presents only the question whether petitioner's appellate counsel acted unreasonably. Those substantive issues would not in any event warrant further review.

1. Petitioner urges the Court to grant certiorari in order to resolve the "open * * * question of what standards to apply to ineffective assistance of appellate counsel" claims. Pet. 14 (quoting *Evitts* v. *Lucey*, 469 U.S. 387, 392 (1985) ("We therefore need not decide the

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purposes have neither been abandoned nor accomplished, and no affirmative showing has been made that it has terminated'") (quoting *United States* v. *Arnold*, 117 F.3d 1308, 1313 (11th Cir. 1997)).

content of the appropriate standards for judging claims of ineffective assistance of appellate counsel.")). Petitioner admits (*ibid.*) that all of the courts of appeals have applied the *Strickland* standard to such claims, as did the court of appeals in this case. See Pet. App. 5a. Indeed, this Court's own decisions have applied the *Strickland* standard to claims of ineffective assistance of appellate counsel.

a. In *Smith* v. *Murray*, 477 U.S. 527 (1986), this Court applied the *Strickland* standard to a claim of ineffective assistance of appellate counsel. See *id.* at 535 ("Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland* v. *Washington*").[5] In *Murray*, the prisoner claimed that counsel rendered ineffective assistance by failing to raise on appeal the issue of admissibility of testimony of a court-appointed psychiatrist who testified at the sentencing phase about a past sexual offense of a defendant convicted of rape and murder. *Id.* at 529-530. Counsel had objected to the admission of the testimony at trial, but did not raise the issue on direct appeal. *Id.* at 531. This Court noted that "various forms of the claim [that the prisoner's counsel omitted on direct ap-

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[5] See *Smith* v. *Robbins*, 528 U.S. 259, 285 (2000) (citing *Smith* v. *Murray*, 477 U.S. 527 (1986), and characterizing it as "applying *Strickland* to claim of attorney error on appeal"); *id.* at 287-288 (determining that the *Strickland* standard applies where appellate counsel has complied with applicable state procedure and found a criminal defendant's appeal to be frivolous and stating "[i]t is no harder for a court to apply *Strickland* in this area than it is when a defendant claims that he received ineffective assistance of appellate counsel because his counsel, although filing a merits brief, failed to raise a particular claim").

peal] had been percolating in the lower courts for years at the time of his original appeal." *Id.* at 537. But the Court determined nonetheless that counsel's failure to raise the claim on direct appeal had not been unreasonable under *Strickland*. The Court explained that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Id.* at 536 (quoting *Jones* v. *Barnes*, 463 U.S. 745, 751-752 (1983)). The Court expressly reaffirmed the principle that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight" and "to evaluate the [attorney's] conduct from counsel's perspective at the time." *Ibid.* (quoting *Strickland*, 466 U.S. at 689) (brackets in original). See *id.* at 534 (characterizing as "irrelevant" a decision by the appellate court that heard petitioner's appeal that was reached after that appeal).

The court of appeals in this case followed the reasoning of *Murray*. As in *Murray*, petitioner's appellate counsel omitted issues on appeal that had been preserved at trial, and petitioner argues that he gained no "tactical advantage" in doing so. Pet. 16. Like this Court in *Murray*, the court of appeals concluded that counsel's performance on appeal had to be judged in light of "the state of the law at the time of" counsel's action—*i.e.*, at the time of petitioner's direct appeal. Pet. App. 5a. And like this Court in *Murray*, the court of appeals concluded that counsel's decision not to pursue the omitted claims was not deficient performance under *Strickland*, because appellate counsel had engaged in a process of "winnowing out" the arguments to be presented on appeal that was not unreasonable when

viewed from that *ex ante* perspective. See, *e.g.*, *ibid.* Indeed, the court not only examined each of the omitted claims from that perspective and found them wanting, but it also noted that, even if an appeal on one or the other ground would have had some chance of success, "counsel could also reasonably fear that the issue was more likely to distract the appellate court's attention from issues with a greater likelihood of success." *Id.* at 11a. As the court explained, "[a]lthough we now know that this court rejected all the issues raised on direct appeal, those issues were not frivolous" and their analysis "took a published opinion occupying 12 pages of text in the reporter to dispose of them." *Ibid.*

b. Petitioner asserts (Pet. 14-15) that there is a conflict in the circuits on the proper application of *Strickland* to an ineffective assistance of appellate counsel claim. Petitioner bases his argument on a purported difference between the Second and Seventh Circuits, which require a "comparison between merits of raised and unraised claims," Pet. 15 (citing *Gray* v. *Greer*, 800 F.2d 644 (7th Cir. 1986), and *Mayo* v. *Henderson*, 13 F.3d 528 (2d Cir. 1994), cert. denied, 513 U.S. 820 (1994)), and the Tenth Circuit, which requires an examination of "the merits of the omitted issue," Pet. 15 (citing *Banks* v. *Reynolds*, 54 F.3d 1508 (1995)).

Closer examination reveals that those cases do not state different legal standards, but simply deal with different factual contexts. In *Banks*, the court concluded that the omitted arguments were "clearly meritorious." 54 F.3d at 1515. There was, therefore, no need to examine the arguments made on direct appeal, because omitting a clearly meritorious claim was enough in the circumstances of that case to constitute

objectively deficient performance.[6] In contrast, the court in *Mayo* concluded that the omitted claim was "particularly strong." 13 F.3d at 534. But the court in *Mayo* then went on to compare the particularly strong claim that was omitted with the "extremely weak" claims presented on direct appeal, and found, based on that comparison, that the appellate attorney's performance was objectively deficient. *Ibid.* That no circuit split exists is well illustrated by *Cargle* v. *Mullin*, 317 F.3d 1196 (10th Cir. 2003), which harmonizes the holdings of *Banks* and *Mayo*. *Cargle*, 317 F.3d at 1202-1203 ("If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted

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[6] Petitioner's contention (Pet. 17-18) that the court of appeals departed from its own "dead bang winner" standard in this case is mistaken. The Tenth Circuit has used the term "dead-bang winner" to refer to an omitted claim that is clearly meritorious, see *e.g.*, *United States* v. *Cook*, 45 F.3d 388, 395 (10th Cir. 1995), and the omission of such a claim may form a basis for a claim of ineffective assistance of appellate counsel. See *Cargle* v. *Mullin*, 317 F.3d 1196, 1202 n.4 (10th Cir. 2003) ("omission of a clearly meritorious issue can be a sufficient basis for such a claim"). That does not mean, however, that a decision on the merits is necessary to the determination of ineffective assistance claims. See *ibid.* ("This court recently rejected the idea that omission of a 'dead bang winner' issue is a necessary condition for prevailing on an appellate ineffectiveness claim. ") (citing *Neill* v. *Gibson*, 278 F.3d 1044, 1057 n. 5 (10th Cir. 2001), cert. denied, 537 U.S. 835 (2002)). In this case, because the court determined that there was no clearly meritorious issue that appellate counsel had omitted, the court had no occasion to use the "dead-bang winner" formulation. In any event, a claim that the court of appeals failed to follow its own precedent would not warrant further review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance.") (citing *Smith*, 528 U.S. at 288, *Banks*, 54 F.3d at 1515-1516, and *Mayo*, 13 F.3d at 533).

2. Petitioner argues that the jury instructions on the Section 241 and Section 3631 counts permitted the jury to convict him for conduct that was protected by the First Amendment, see Pet. 19-27, and that a Section 844(h)(1) conviction may not be based on a Section 241 conspiracy, see Pet. 27-33. Those claims are not squarely before this Court in this case.

This case arises from petitioner's motion under Section 2255, in which he attempted to present claims that were defaulted on direct appeal. The court of appeals held—and petitioner does not dispute—that those claims were thus procedurally barred unless petitioner could show cause and prejudice to excuse his default. Pet. App. 4a. The court of appeals decided this case on the ground that petitioner was unable to make a showing of cause for the default, because he was unable to show that he received ineffective assistance of counsel.

In that posture, the only issue presented to the court of appeals was the case-specific one of whether petitioner received ineffective assistance of counsel on direct appeal. To resolve that question, the court of appeals did have to consider the merits of the claims that petitioner sought to raise, in order to determine whether counsel rendered ineffective assistance in fail-

ing to raise them. But the court did not ultimately have to resolve those claims.

For example, the court of appeals did not decide whether the Section 3631 jury instructions in this case were inadequate. Instead, the court concluded only that "[i]f there is a flaw [in the Section 3631 jury instructions], it is a subtle one," and that, although "[p]erhaps an appeal on this ground would have succeeded," counsel could also reasonably have concluded that other issues were more promising. Pet. App. 10a-11a. On the Section 241 count, the court did state that the instructions were "flawed," but it did not definitively resolve whether any error would have entitled petitioner to relief. Instead, it concluded only that counsel could have reasonably omitted the claim of instructional error on appeal, because the likelihood that the error would be considered harmless was "considerable." *Id.* at 13a. On the permissibility of applying Section 844(h)(1) based on the Section 241 conspiracy, the court concluded only that it was "not sure" that it would adopt petitioner's position in light of considerable arguments opposing it, *id.* at 17a, and that it "need not resolve" the issue definitively because "it was not so obvious at the time of [petitioner's] direct appeal that counsel's failure to raise [the issue] was unreasonable," *id.* at 18a.

In its present posture, this case therefore presents only the question whether the court of appeals erred in concluding that petitioner's appellate counsel was not ineffective. It does not present an appropriate opportunity for this Court to address the merits of the various substantive issues that petitioner seeks to present. Thus, even if resolution of the substantive issues identified by petitioner otherwise warranted this Court's re-

view, such review would better await a case in which the merits of those issues would be squarely presented and could be finally settled.

3. In any event, the substantive issues identified by petitioner would not warrant further review.

a. Contrary to petitioner's contention (Pet. 25-26), the Section 3631 jury instructions adequately ensured that petitioner could not be convicted for engaging in conduct protected by the First Amendment. In *Virginia* v. *Black*, this Court determined that "[i]ntimidation," which "is a type of true threat," is "constitutionally proscribable" when done "with the intent of placing the victim in fear of bodily harm." 538 U.S. at 360. The Section 3631 jury instructions in this case adequately conveyed to the jury that only conduct threatening use of physical force is proscribed. The jury was instructed that, to convict petitioner, it had to find that petitioner "*used force or threat of force*," and that "[t]he term 'force' includes the exercise and application of physical power" and "means power, violence, compulsion, or restraint exerted upon or against a person or thing." Pet. App. 8a, 9a. That is sufficient to ensure that the jury convicted petitioner only upon finding that he had used a "threat of force" as that term was understood in *Black*—*i.e.*, a threat that was intended to "plac[e] the victim in fear of bodily harm."

Petitioner also objects to the statement in the instructions that "to threaten or intimidate does not require the possibility of physical force or physical harm." Pet. 26 (emphasis omitted); see Pet. 24. As the court of appeals held, see Pet. App. 11a, that statement correctly informed the jury that it could convict if petitioner's cross burning amounted to a threat of physical force, even if petitioner did not actually intend to carry

out the threat. See *Black*, 538 U.S. at 360 (determining that a cross burner "need not actually intend to carry out the threat" in order for his conduct to be proscribable).

b. With respect to the Section 241 conviction, even if the instructions permitted conviction without requiring a threat of force and, as the court of appeals stated, were "flawed" for that reason, see Pet. App. 12a, the error was harmless. Petitioner was charged pursuant to Section 241 with conspiracy to "oppress, threaten, or intimidate" the Henrys "in the free exercise or enjoyment of" their housing rights. It is undisputed that the charged Section 241 conspiracy was a conspiracy to engage in the cross burning, which was itself the basis of the Section 3631 charge. As explained above, the instructions on petitioner's Section 3631 charge did require the jury to find use or threat of force as an element of the crime and explained that the force must be physical force. The jury's finding of guilt on that charge therefore shows that the jury determined that petitioner's cross burning exhibited physical force or the threat of physical force. Accordingly, the jury's finding on the Section 3631 count established that, even if the instructions on the Section 241 count failed to require proof that petitioner had conspired to use physical force against the victims and was flawed, the jury would have found that the object of the conspiracy was a "true threat"—*i.e.*, a threat of physical force against the victims. Contrary to petitioner's argument (Pet. 27), there is no danger that petitioner was convicted under Section 241 for conspiring to engage in conduct protected by the First Amendment. Further review of petitioner's First Amendment claims would therefore be unwarranted.

c. Nor would further review be warranted to determine whether a Section 241 conspiracy may be a predicate offense on which a Section 844(h)(1) conviction can be based. See Pet. 27-33. In *United States* v. *Colvin*, 353 F.3d 569, 576 (2003) (en banc), cert. denied, 543 U.S. 925 (2004), the Seventh Circuit held that Section 844(h)(1) could not be based on a Section 241 conspiracy. No other court of appeals, however, has ruled on that issue. The court of appeals in this case did not reach a final conclusion on that issue, although it did observe that there are substantial reasons not to "embrace *Colvin*." Pet. App. 17a. There is accordingly no conflict in the circuits on the question whether Section 241 may be a predicate for a Section 844(h)(1) conviction, and petitioner has made no showing that that question is of such exceptional importance that further review would be warranted even in the absence of a conflict.[7]

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[7] Quoting the trial transcript, petitioner notes (Pet. 29) that, in response to argument, the trial court expressed doubt about whether Section 844(h)(1) could be based on a Section 241 predicate felony. Ultimately, however, the trial court determined that petitioner's argument was mistaken, and it declined to dismiss the Section 844(h)(1) count. The same district court again concluded in analyzing petitioner's Section 2255 motion that "petitioner's act of burning a cross was part of his conspiracy to burn a cross" because it was an overt act of the conspiracy. Pet. App. 40a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-787

IN THE
Supreme Court of the United States

October Term 2005

MICHAEL BRAD MAGLEBY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Introduction - This Case Presents an Excellent Opportunity for this Honorable Court to Establish Standards for Effectiveness of Appellate Counsel

The Government erroneously states that this Court previously concluded that *Strickland* applies to claims of ineffective assistance of appellate counsel, citing *dicta* in *Smith v. Murray*, 477 U.S. 527 (1986) and other cases. Pet. Opp. 11-15. But unlike the case presented here, neither *Smith* nor the other cases cited by the Government:

- Involved obvious, well-preserved issues based on law pre-existing the trial that appellate counsel had failed to present on direct appeal;
- Examined what 'form' of *Strickland* should be applied to such well-preserved claims based on prior existing law, a matter that is of public importance and to which a clear Circuit split exists; and
- Appreciated the adverse impact of the lack of guidance from this Court concerning standards for effective appellate counsel, resulting in the needless expenditure of scarce judicial resources on deficiently argued appeals.

The focus of the practicing criminal defense appellate attorney is necessarily narrow—appellate counsel can generally only argue those issues that are in the record and that have been objected to by trial counsel. Thus it is with this focus on the record and preserved objections that an effective appellate advocate depends. Indeed, there should be extremely few meritorious claims of ineffective assistance of appellate counsel from not presenting an unpreserved issue unless it is plain error. Most non-frivolous claims of ineffectiveness are likely to present circumstances such as this - where appellate counsel fails to present obvious, well-preserved issues from the trial.

This case, with its clear and well-preserved First Amendment and conspiracy law claims that were ignored by Petitioner's original appellate counsel, presents an excellent but rare opportunity for this Court to discuss this important matter in a way that is easily comprehensible for practitioners and lower courts alike. Without Certiorari, the

Circuit Courts of Appeals, as well as state courts who look towards this Court on how to apply the right to effective assistance of counsel, will continue to lack guidance on the standards governing criminal appellate attorneys' consideration of the law and record when winnowing out weaker arguments in favor of clear winners.[1]

1. Smith v. Murray and Related Cases

The Government contends that *Smith v. Murray*, 477 U.S. 527 (1986) has already addressed what standards apply to claims of ineffective assistance of appellate counsel. But a review of *Smith* finds no support for this contention.[2]

Smith v. Murray came out a year after *Evitts v. Lucey*, 469 U.S. 387 (1985), which specified standards that apply to claims of ineffective assistance of appellate counsel remained an open question. *Evitts*, at 392. *Murray* presented the question whether a prosecutor may elicit damaging testimony from a psychiatrist appointed at a homicide defendant's request to explore the possibility of presenting psychiatric defenses at trial (a claimed violation of the defendant's right against self-incrimination that at the time of defendant's original appeal was barred by a two-year old Virginia precedent).

But this Court did not reach this question, instead ruling that it is "self-evident that [Smith] has failed to demonstrate cause for his non-compliance with Virginia's procedures" in raising this claim during his direct appeal. *Murray*, at 533. [3] Not once in *Smith v. Murray* was the

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[1] Mirroring the Tenth Circuit's factual error in its reported decisions below, the Government reports that the cross burning in this case occurred in 1996. Pet. Opp. 2; Pet. App. 2a, 22a, & 46a. In fact, the cross burning occurred during the 1998 Labor Day weekend, and Magleby was convicted and sentenced to 144 months beginning December 20, 1999. Pet 6; Pet. App. 24a (corroborated by court records).

[2] The Tenth Circuit never mentions *Smith v. Murray* in *Magleby*, belying the Government's claim that the court was "following the reasoning of *Murray*." Pet. Opp. 12.

[3] "[Defense] counsel may not make a tactical decision to forgo a procedural opportunity—for instance, to object a trial or to raise an issue on appeal—and then when he discovers that the tactic has been

previous *Evitts* case even cited. As reflected by the comments of a justice of this Court during oral arguments in *Murray*, "[w]e didn't grant certiorari on the ineffective assistance of counsel claim," which is also reflected in the briefs filed with this Court. Trans. Oral Argument, Mar. 4, 1985, *Smith v. Murray*, 1985 U.S. TRANS LEXIS 10, *24. *See also* Brief of Petitioner, *Smith v. Murray*, 1985 U.S. Briefs 5487. The brief mention of *Strickland* in a single paragraph in *Murray* is only *dicta* to illustrate that Petitioner's claims in that case could not have remotely reached a constitutional claim of ineffectiveness, since the well-established existing law in Virginia at that time **was against** such an argument being made in the direct appeal in that case.

Moreover, unlike the First Amendment and conspiracy law defenses ignored by appellate counsel in *Magleby*, the defendant's objections to the admission of the psychiatrist's testimony in *Murray* did not result in the conviction of a defendant who may be actually innocent. Thus the "imperative of correcting a fundamentally unjust incarceration" did not exist. *Murray*, at 536.

The underlying facts and holding in *Smith v. Robbins*, 528 U.S. 259 (2000) are similarly inapposite to the Questions Presented in this case. *Robbins* considered a highly specific question as to whether the State of California's procedure approved in *People v. Wende*, 25 Cal. 3d 436 (1979) violated the system of no-merit briefs that this Court had adopted and approved in *Anders v. California*, 386 U.S. 738 (1967). *Robbins* was a criminal defendant who waived his right to counsel at trial and represented himself. Having failed to make proper objections after a knowing and voluntary waiver of the right to counsel, there existed **no preserved arguments at trial to raise on appeal.** As a result, Smith's appointed appellate attorney sought permission to file a "no-merit brief" under *Wende*, and the appeal was affirmed.

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unsuccessful, pursue an alternative strategy in federal court...Procedural defaults of this nature, are, therefore, inexcusable, and cannot qualify as 'cause' for purposes of federal habeas corpus review." *Murray*, at 534 (*quoting Reed v. Ross*, 468 U.S. 1, 14 (1984)).

Robbins, a. ..*1*. This left Robbins with only a proceeding for habeas review to challenge his appointed appellate counsel's decision to file a "no-merit brief." Because the Court of Appeals for the Ninth Circuit concluded there existed two 'arguable' issues that should have been presented, the Ninth Circuit presumed prejudice and ordered a new appeal. *Id.* at 268. As part of the remand by this Court to clarify the level of merit associated with the 'arguable' issues, this Court noted in its remand order that prejudice should not be presumed in non-merit briefs such as those under *Anders* and *Wende*, and cited the *Strickland* standard as appropriate, so that Robbins "must show that his counsel was objectively unreasonable in *failing to find arguable issues to appeal*—that is, that counsel unreasonably failed to discover non-frivolous issues and to file a merits brief raising them...[t]hat is, he must show a reasonable probability, that, but for his counsel's unreasonable *failure to file a merits brief*, he would have prevailed on his appeal." [Emphasis Added] *Id.* at 285.

Numerous authorities show that the lower courts and legal community believe that the issue of what standards govern ineffective assistance of appellate counsel has not been examined by this Court since *Evitts* left open the question. *See e.g., Fern v. Gramley*, 99 F. 3d 255, 257 (7th Cir. 1996); *Claudio v. Scully*, 982 F.2d 798, 808 (2nd Cir. 1992) (*Citing Evitts*, "[t]he Supreme Court has not yet decided this issue."); *Lattimore v. Dubois*, 152 F. Supp. 2d 67, 85 (D. Mass. 2001); *Avellar v. Dubois*, 30 F. Supp. 2d 76, 88 (D. Mass. 1998) (*Citing Evitts*, "[t]o date, the [Supreme] Court has not revisited this issue."). *See also* Lissa Griffin, "The Right to Effective Assistance of Appellate Counsel," 97 W. Va L. Rev. 1, 18 (1994) (Not citing *Smith v. Murray*, and writing that: "the Supreme Court clearly stated in *Evitts* that since the State did not challenge the finding of counsel's deficiency, it "need not decide the content of appropriate standards for judging claims of ineffective assistance of appellant counsel. *Cf. Strickland v. Washington.*' As at least one judge has noted, '[a]rguably, the 'cf.' cite to *Strickland* implies that the appellate standard might be different.'") [Citations Omitted]

2. The *Magleby* Case, Prior Tenth Circuit Case Law, and Present Circuit Court Split

As pointed out by the Petition, the Tenth Circuit's decision in *Magleby* "contradicts the dead-bang winner standard in *United States v. Cook*, and *Neill v. Gibson*. It also contradicts *Strickland v. Washington*, which stressed the need for an 'objective' standard for ineffective assistance of trial counsel." [Citations Omitted] (Pet. 18) Having failed to follow its own "dead-bang winner" precedent, *Magleby* now leaves it unclear what standard of review the Tenth Circuit uses for ineffective assistance of appellate counsel claims. Nevertheless, there is still be a Circuit split existing between those Circuits that follow the "dead-bang winner" approach to ineffective assistance of appellate counsel claims and those Circuits that have not adopted the "dead-bang winner" standard, either by adopting a requirement at examining eleven factors as the Sixth Circuit has done, or simply following a straight *Strickland* approach. Pet. 14-15.[4] Additionally, the Circuits differ in how the determination of ineffective assistance of appellate counsel works in practice, either by comparing the relative strength of the raised and omitted claims, or a determination that prejudice results from solely examining the omitted issue.[5] Pet. 15.

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[4] *See also Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) ("His lawyer failed to raise either [meritorious] claim, instead raising weaker claims...No tactical reason—no reason other than oversight or incompetence -has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had."); *Bell v. Smith*, 236 F. 3d 149, 180 (4th Cir. 2000)(*en banc*)(Motz, dissenting) ("As demonstrated within, well prior to Bell's 1994 trial, Supreme Court precedent required that trial courts express on-the-record findings before closing a courtroom...Here, Bell's trial counsel did properly object to this clear constitutional violation, and yet appellate counsel still did not find this issue important enough to brief. Instead, appellate counsel chose to assert evidentiary challenges that had no likelihood of success. Appellate counsel's failure to raise the one issue that would have been a "dead-bang winner" renders his assistance constitutionally ineffective.")

[5] As opposed to the Government's erroneous claim that the Circuits have 'harmonized' the examination process to allow those most 'meritorious' claims to be dealt with through dead-bang winner

The Government misstates the holding of *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003), claiming that a Court does not have to decide the merits to determine ineffective assistance of appellate counsel claims. Pet. Opp. 14, fn. 6 In fact, *Cargle* illustrates that the Tenth Circuit in *Magleby* not only did not follow its own *en banc* precedent in *Neill v. Gibson*, but that it adopted a position that contradicted *this Court* in *Strickland*, because the lower court *does not now have to ascertain the merits of the omitted claim.*

In *Cargle v. Mullin*, 317 F.3d 1196 (2003), a question existed as to whether the federal courts should defer to an Oklahoma Court of Criminal Appeals (OCCA) decision when deciding habeas relief under the Anti-terrorism Effective Death Penalty Act. As noted in the Petition for Writ of Certiorari, Oklahoma has a statute on ineffective assistance of appellate counsel that does not follow *Strickland*. (Pet. Ftnt. 2) Observing that the "deferential standard of review does not apply if the state court employed the wrong legal standard in deciding the merits of the federal issue," the Tenth Circuit held, "[t]he OCCA applied the wrong standard here." *Cargle*, 317 F.3d at 1202.

While observing that *Neill v. Gibson* permitted a litigant to establish ineffective assistance of appellate counsel through *either* "dead bang winner" analysis or

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examination, an examination of those Courts that require a comparison between raised and un-raised claims shows that they do not follow "Dead-bang winner" approach, thus requiring even the most obvious preserved issues to be subject to review as to the relative strength of the merits of the un-raised versus raised claims, before permitting habeas relief. *Cf. Claudio v. Scully*, 982 F.2d 798 (2nd Cir. 1992) (Not requiring comparison of un-raised versus raised claims on appeal, nor adopting "dead-bang winner" approach, yet granting habeas relief as "[n]o reasonably competent attorney should have missed the ...claim"). *See also United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995) ("[W]e conclude that although counsel presented several strong but unsuccessful claims on direct appeal, see *Cook I, 949 F.2d at 289*, counsel omitted a "dead-bang" winner--i.e., the conflict of interest issue--and thus rendered ineffective assistance. The conflict of interest issue was obvious from the trial record as the inappropriateness of the trial court's order "leaped out upon even a casual reading of [the] transcript.")

traditional *Strickland* analysis, *Cargle* went further. It noted that under Oklahoma law, "the merits of the omitted claim need not even be considered in evaluating whether appellate counsel's performance was deficient." *Id.* at 1204. "[P]etitioners must establish not only a meritorious omitted issue but also an improper motive or cause behind counsel's omission of the issue." *Id.* Thus, the Tenth Circuit held,

> "[i]t is clearly wrong, as a matter of federal law, to require as a necessary condition for relief under *Strickland*, something beyond the obvious merit of the omitted claim. The very focus of a *Strickland* inquiry regarding performance of appellate counsel upon the merits of omitted issues, and *no test that ignores the merits of the omitted claim in conducting its ineffective assistance of appellate counsel analysis comports with federal law.* A sufficiently meritorious omitted claim certainly can, by itself (or in relation to other issues that counsel did pursue), establish constitutionally deficient performance by appellate counsel. Because the OCCA's analysis of petitioner's appellate ineffectiveness allegations deviated from the controlling federal standard, *see Cargle*, 947 P.2d at 588-589, (repeatedly invoking principle contrasted with *Strickland* here), it is not entitled to deference." [*Emphasis Added*] *Id.* at 1205.

If this Court had previously clearly stated the standards to be used to determine ineffective assistance of appellate counsel, the Tenth Circuit would have simply followed this Court's case law when it reviewed the matter below. Yet the Tenth Circuit in *Magleby* not only failed to follow either its 'dead-bang winner' analysis in *Cook*, or *Cargle's* teaching that not examining the merits of an omitted issue "is clearly wrong as a matter of federal law" and violates *Strickland*, but concluded that it did not have to adjudicate the merits of Magleby's well-preserved and obvious claims. Pet. 17, 28. *Cargle* thus further illustrates the urgent need for this Court to set clear and comprehensive standards on this important issue.

3. Failure to Argue 'Flawed' Jury Instructions

As the Government concedes, the Tenth Circuit avoided resolving Magleby's claims that the trial court's instructions were reversible errors under the First Amendment. Pet. Opp. 15-16. Instead, the Tenth Circuit speculated that counsel could have "reasonably feared" that these issues would distract the appellate court from other issues and that pertinent caselaw was absent from the Supreme Court or the Tenth Circuit to support such claims at the time of the direct appeal. Pet. App. 11a, 14a.

Neither of these arguments is supported by the record or the law. There is nothing in the record to show that appellate counsel considered raising the First Amendment and conspiracy law claims in Magleby's direct appeal, let alone that he weighed their merits versus the numerous unsuccessful issues that he did present. The affidavit of Magleby's original trial counsel shows that appellate counsel never even conferred with trial counsel before entering his appearance, much less weighed the existing law behind Magleby's defense that he lacked the intent to threaten or inflict bodily harm. Pe.. App. 109a-118a And the existing law from this Honorable Court at the time of the trial and the original direct appeal had long established the principle that the First Amendment only permits conviction only for threatening or obnoxious speech when it is shown that the speaker intends a "true threat." *See* caselaw cited in Petition for Writ of Certiorari, pp 20-22

"Thus the Government may prosecute a cross burner based on the threatening message that he conveys only when it proves that he intends - by that message - to incite imminent lawless action or cause fear of such imminent force or violence. *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969). "What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707 (1969). "Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specific disfavored topics." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). What makes it even more obvious that this was the existing